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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1503**

In re the Matter of:

Erica Ann Cortez, and OBO Minor,
Appellant,

vs.

Francisco Fredrick Galvan,
Respondent.

**Filed August 30, 2021
Affirmed
Johnson, Judge**

Hennepin County District Court
File No. 27-DA-FA-20-5032

Eric R. Sherman, Dorsey & Whitney L.L.P., Minneapolis, Minnesota (for appellant)

Francisco Fredrick Galvan, Litchfield, Minnesota (*pro se* respondent)

Considered and decided by Gaïtas, Presiding Judge; Worke, Judge; and Johnson,
Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

In 2016, Erica Ann Cortez obtained an order for protection against Francisco Fredrick Galvan for the benefit of herself and her three minor children. The order expired two years later. In 2020, Cortez petitioned for a new order for protection on behalf of herself and her three minor children. The district court issued a new order for protection

that protects Cortez and one minor child but does not protect the two other minor children. Cortez appeals on behalf of the two minor children who are not protected by the new order for protection. We affirm.

FACTS

Cortez and Galvan were married in 2004. They are the parents of two joint children: a son, J.J.G., who was born in 2004, and a daughter, J.A.G., who was born in 2005. Cortez's and Galvan's marriage was dissolved in June 2013. Approximately two months later, Cortez gave birth to a son, F.C.L., who is not Galvan's biological child.

In 2016, Cortez petitioned the Kandiyohi County District Court for an order for protection (OFP) on behalf of herself, J.J.G., J.A.G., and F.C.L. The district court granted the petition on the ground that Galvan had threatened Cortez and had contacted an older, then-minor child of Cortez (who apparently is not Galvan's biological child) for the purpose of obtaining controlled substances. The district court issued an OFP prohibiting Galvan from contacting Cortez, J.J.G., J.A.G., and F.C.L. for two years.

In February 2017, Galvan contacted Cortez by telephone and attempted to contact J.A.G. through social media. Cortez reported the contacts to law enforcement. In March 2017, the state charged Galvan in Kandiyohi County with two counts of violating an OFP, in violation of Minn. Stat. § 518B.01, subd. 14(c) (2016). In June 2017, Galvan pleaded guilty, and he was sentenced to a period of confinement in a county jail.

In September 2020, Cortez petitioned, on behalf of herself and her three minor children, the Hennepin County District Court for a new OFP. She alleged that Galvan had violated the prior OFP. She also summarized electronic messages that Galvan had recently

sent to her and to their children, and she described physical abuse that Galvan had inflicted on her during their marriage. In addition, she alleged that she and her children feel threatened by Galvan.

The district court granted an *ex parte* OFP and scheduled an evidentiary hearing. At the evidentiary hearing, Cortez appeared with an attorney and testified in support of her petition. She testified that Galvan was abusive toward her during their marriage. For example, she testified that Galvan was convicted of felony domestic assault in 2007 for an incident in which, while they were separated, Galvan broke into her home, confined her for hours, punched her in the eye, and hit her with a towel bar that he had ripped from the wall. Cortez also testified that Galvan was physically and emotionally abusive toward her in various other ways during their marriage. She testified that she is afraid of Galvan because he continues to use abusive tactics that he previously used when they were married and because he generally is angry, hostile, bitter, and resentful. She explained that Galvan threatens to report her to law enforcement for violating the law (an accusation she denies) and threatens to ruin her career. She testified generally that she is afraid for her children because Galvan contacts them and says negative things about her and inappropriately shares other upsetting information with them.

On cross-examination by Galvan, Cortez testified that when Galvan has asked to visit with J.J.G. and J.A.G., she usually has told him to contact the visitation center but has allowed visits in other places on two occasions because the children prefer not to go to the visitation center. When asked whether the children have said that they fear Galvan, Cortez testified only that their daughter, J.A.G., has said so.

Galvan testified on his own behalf that he was in Texas and unaware of the Kandiyohi County OFP when he violated it. He also testified that he is interested in spending time with his children and believes that they are not afraid of him.

At the conclusion of the hearing, the district court announced that it would grant a new OFP on the ground that Galvan had violated the Kandiyohi County OFP. The district court stated that the new OFP would protect Cortez and J.A.G. The district court stated that there is insufficient evidence for a new OFP to protect J.J.G. or F.C.L. based on Galvan's violation of the OFP. The district court explained that the only evidence of a previous violation was of a violation "involving Ms. Cortez and [J.A.G.]." Before adjourning the hearing, the district court stated that the OFP would include an exception for parenting time between Galvan and his children in the manner provided in the dissolution decree. Cortez's attorney stated that Cortez preferred that communications concerning parenting time be done using the Our Family Wizard website.

Later that day, the district court issued an OFP that includes the terms described by the district court at the hearing. The OFP includes the following findings of fact:

The Court finds that Petitioner has sufficiently established that Respondent has violated a prior Order for Protection and that she is fearful of Respondent as defined by Minn. Stat. § 518B.01, subd. 6. Petitioner has met her burden and that a subsequent Order for Protection should be issued.

Petitioner is also required to meet the burden of proof that it is more likely than not that the allegations in the petition are not only true but also rise to the statutory requirement for a subsequent order for protection Petitioner did meet the burden of proof necessary for an Order for Protection for herself and the minor child [J.A.G.].

However, the Court did not receive any testimony or evidence that Respondent violated the prior order in relation to [J.J.G.] and [F.C.L.]. Additionally, there was no evidence that they are in fear of him, that he has physically harmed them, or that he has harassed them. Therefore, the Order for Protection will not be granted on their behalf, and they will be removed from this proceeding and the caption.

The OFP prohibits Galvan from having any contact with Cortez or J.A.G., with certain exceptions relating to parenting time and proceedings in family court. The OFP also prohibits Galvan from being present within two blocks of Cortez's home and from being present at Cortez's workplace, Cortez's mother's residence, and a local school.

Cortez appeals. Galvan has not filed a responsive brief. "If the respondent fails or neglects to serve and file its brief, the case shall be determined on the merits." Minn. R. Civ. App. P. 142.03. This court previously issued an order stating that the appeal would be submitted pursuant to rule 142.03. Accordingly, we proceed to consider and resolve Cortez's arguments for reversal.

DECISION

Cortez argues that the district court erred by issuing a new OFP that does not protect J.J.G. and F.C.L. Specifically, she contends that the district court erred for the following reasons:

The district court erred by basing its denial of the children's application for a subsequent OFP upon an incorrect interpretation of subdivision 6a of the Domestic Abuse Act. The unambiguous text of subdivision 6a requires an applicant to show only that "the respondent has violated a prior or existing order for protection" to obtain an extended or subsequent OFP. It does not require an applicant to show that a respondent directed his or her violation of a prior OFP at any particular protected person. Under settled principles of

statutory interpretation, the district court was not free to impose a requirement upon petitioner that the legislature omitted.

To the extent that Cortez challenges the district court's interpretation of the Domestic Abuse Act, we apply a *de novo* standard of review. *Thompson ex rel. Minor Child v. Schrimsher*, 906 N.W.2d 495, 498 (Minn. 2018). To the extent that Cortez challenges the district court's exercise of its discretion to grant or deny an OFP, we apply an abuse-of-discretion standard of review. *Id.* at 500.

A.

The purpose of the Domestic Abuse Act is “to provide speedy, effective relief to victims of domestic abuse.” *Burkstrand v. Burkstrand*, 632 N.W.2d 206, 213 (Minn. 2001). The act defines “domestic abuse” to mean “(1) physical harm, bodily injury, or assault; (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or (3) terroristic threats . . . , criminal sexual conduct . . . , or interference with an emergency call . . . ,” if such actions are “committed against a family or household member by a family or household member.” Minn. Stat. § 518B.01, subd. 2(a) (2020).

Under the act, a person may petition a district court for an OFP against a family or household member. *Id.*, subd. 4(a). The district court may provide relief to a petitioner by issuing an OFP that, among other things, “restrain[s] the abusing party from committing acts of domestic abuse,” “exclude[s] the abusing party from the dwelling which the parties share or from the residence of the petitioner,” or “exclude[s] the abusing party from a reasonable area surrounding the dwelling or residence, which area shall be described specifically in the order.” *Id.*, subd. 6(a)(1)-(3); *see also id.*, subd. 6(a)(4)-(15). In addition,

the district court may “order, in its discretion, other relief as it deems necessary for the protection of a family or household member.” *Id.*, subd. 6(a)(13). This provision allows a district court to “grant relief to minors in a family or household where domestic abuse occurs, pursuant to an OFP granted to the victim of the abuse.” *Schmidt ex rel P.M.S. v. Coons*, 818 N.W.2d 523, 529 n.6 (Minn. 2012).

In general, an OFP may be in force for no more than two years. Minn. Stat. § 518B.01, subd. 6(b). A petitioner who has obtained an OFP may apply for an extension of the OFP or a new OFP if the initial OFP has expired. *See id.*, subd. 6a(a). A district court may extend an OFP or grant a new OFP subsequent to an initial OFP if the petitioner establishes that:

(1) the respondent has violated a prior or existing order for protection;

(2) the petitioner is reasonably in fear of physical harm from the respondent;

(3) the respondent has engaged in the act of harassment within the meaning of section 609.749, subdivision 2; or

(4) the respondent is incarcerated and about to be released, or has recently been released from incarceration.

Id., subd. 6a(b).

In *Thompson*, the supreme court stated that “OFPs are never granted automatically.” 906 N.W.2d at 500. Rather, the issuance of an OFP is a matter of discretion. *Id.* A district court “*may* provide relief” to a petitioner in a variety of forms. Minn. Stat. § 518B.01, subd. 6(a) (emphasis added); *see also id.*, subd. 6(a)(1)-(15). The word “may” in

subdivision 6(a) indicates that “[t]he district court’s decision is discretionary.” *Thompson*, 906 N.W.2d at 500. If a petitioner has established that the respondent engaged in domestic abuse, the district court “may examine all of the relevant circumstances proven to determine whether to grant or deny the petition for an OFP.” *Id.* “Relevant circumstances may include, but are not limited to, the timing, frequency, and severity of any alleged instances of ‘domestic abuse,’ along with the likelihood of further abuse.” *Id.*

The subdivision authorizing the issuance of a new OFP subsequent to an initial OFP uses similar language. It provides generally that, after notice and a hearing, the district court “*may* extend the relief granted in an existing order for protection or, if a petitioner’s order for protection is no longer in effect when an application for subsequent relief is made, grant a new order.” Minn. Stat. § 518B.01, subd. 6a(a) (emphasis added). That subdivision provides more specifically that, if the petitioner establishes any of the four grounds necessary for an extension of an existing OFP or a new OFP, the district court “*may* extend the terms of an existing order or . . . grant a new order.” *Id.*, subd. 6a(b) (emphasis added). The use of the word “may” in two different sentences in subdivision 6a indicates that the district court has discretion to extend an OFP or to issue a new OFP or to not do so. *See Thompson*, 906 N.W.2d at 500. Similarly, the statute authorizing the various forms of relief that may be provided by an OFP states that a district court may “order, *in its discretion*, other relief as it deems necessary for the protection of a family or household member.” Minn. Stat. § 518B.01, subd. 6(a)(13) (emphasis added).

B.

In this case, the district court granted Cortez's petition for a new OFP for two reasons: Galvan had violated the Kandiyohi County OFP, and Cortez and J.A.G. are afraid of Galvan. See Minn. Stat. § 518B.01, subd. 6a(b)(1)-(2). The district court stated that Cortez had satisfied "the burden of proof necessary for an order for protection for herself and the minor child, [J.A.G.]." Accordingly, the OFP protects Cortez and J.A.G. But the OFP does not protect J.J.G. and F.C.L. The district court did not order protection for J.J.G. and F.C.L. because it found that there was no evidence that Galvan "violated the prior order in relation to" them. In addition, the district court found with respect to J.J.G. and F.C.L. that "there was no evidence that they are in fear of [Galvan], that [Galvan] has physically harmed them, or that [Galvan] has harassed them."

The district court's decision to issue a new OFP that protects Cortez and J.A.G. is consistent with the circumstances revealed by the evidence presented at the hearing. See *Thompson*, 906 N.W.2d at 500. Cortez proved that Galvan violated the prior OFP by contacting her by telephone and by attempting to contact J.A.G. through social media. Cortez testified about prior physical abuse of her by Glavan. Cortez also testified that both she and J.A.G. are afraid of Galvan. In light of the evidence and the findings of fact, the district court appropriately exercised its discretion by issuing a new OFP to protect Cortez. In addition, the district court appropriately exercised its discretion by issuing a new OFP that prohibits Galvan from contacting J.A.G. because it is reasonable to believe that such a provision is "necessary for the protection of a family or household member." See Minn.

Stat. § 518B.01, subd. 6(a)(13). There is no argument to the contrary on appeal.

The district court's decision to issue a new OFP that does *not* prohibit contact with J.J.G. and F.C.L. also is consistent with the evidence presented at the hearing. In its findings of fact, the district court stated that it “did not receive any testimony or evidence that [Galvan] violated the prior order in relation to [J.J.G.] and [F.C.L.]” and further stated that “there was no evidence that they are in fear of him, that he has physically harmed them, or that he has harassed them.” Cortez does not challenge these findings. Indeed, Cortez did not seek to prove that Galvan violated the prior OFP by contacting or attempting to contact J.J.G. or F.C.L. In addition, Cortez testified that she has allowed visits between Galvan and J.J.G., including visits not at the visitation center because that is J.J.G.'s preference, which indicates that J.J.G. does not fear Galvan. Furthermore, J.J.G. was nearly 17 years old at the time of the hearing, and he will become an adult in January 2022. Moreover, Cortez did not present any evidence whatsoever concerning any contact or attempted contact between Galvan and F.C.L., apparently because F.C.L. was only eight years old at the time of the hearing and because F.C.L. has no biological connection to Galvan.

The evidence as a whole indicates that Galvan is not likely to abuse J.J.G. and F.C.L. in the future, which is one of the relevant circumstances identified in *Thompson*. See 906 N.W.2d at 500. To reiterate, the act provides that a district court may “order, *in its discretion*, other relief as it deems necessary for the protection of a family or household member.” Minn. Stat. § 518B.01, subd. 6(a)(13) (emphasis added). In light of the evidence and the findings of fact, the district court did not abuse its discretion by issuing a new OFP

that does *not* prohibit Galvan from contacting J.J.G. or F.C.L. because it is reasonable to believe that such a provision is *not* “necessary for the protection of a family or household member.” *See id.*

C.

Cortez urges this court to reverse on the ground that the district court’s decision is based on “an incorrect interpretation of subdivision 6a” of the act. More specifically, Cortez contends that the district court committed an “error of law” by making a “legal conclusion that the Domestic Abuse Act . . . required [J.J.G. and F.C.L.] to show that each was a target of an OFP violation.” There is no indication in the OFP itself or in the record that the district court imposed such a requirement as a matter of law. The relevant paragraphs of the OFP are phrased as case-specific, fact-dependent determinations, not statements of law. The relevant paragraphs of the OFP do not cite any legal authorities. Nothing in the transcript of the hearing indicates that the district court misunderstood the applicable law. Cortez has not demonstrated that the district court did anything other than exercise discretion when it ordered protection for Cortez and J.A.G. but not for J.J.G. and F.C.L.

Cortez appears to contend that the district court was required to order protection for all three of the children because all three of them were protected by the initial OFP. For example, she asserts in her brief that proof of a violation of an initial OFP “is a sufficient factual predicate for an extended or subsequent OFP regardless whether the applicant was the target of the violation.” But the supreme court has made clear that “OFPs are never granted automatically.” *Thompson*, 906 N.W.2d at 500. Rather, the statute authorizing the

issuance of a new OFP confers discretion on a district court by providing that, if a petitioner establishes any of the four prerequisites, the district court “*may* extend the terms of an existing order or . . . grant a new order.” Minn. Stat. § 518B.01, subd. 6a(b) (emphasis added). Furthermore, the statute authorizing relief for family members of petitioners who are victims of domestic abuse states that a district court may, “*in its discretion*,” order such relief “*as it deems necessary* for the protection of a family or household member.” *Id.*, subd. 6(a)(13) (emphasis added); *see also Schmidt*, 818 N.W.2d at 529 n.6. Cortez does not cite subdivision 6(a)(13) and does not acknowledge the ways in which the pertinent statutory provisions grant discretion to a district court in the circumstances of this case.

In sum, the district court did not err by issuing a new OFP that protects Cortez and J.A.G. but does not protect J.J.G. and F.C.L.

Affirmed.